

**38 CFR Part 3****RIN 2900-AR76****Reevaluation of Claims for Dependency and Indemnity Compensation****AGENCY:** Department of Veterans Affairs.**ACTION:** Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its adjudication regulations concerning certain awards of Dependency and Indemnity Compensation (DIC). Under the proposed amendment, relevant claimants will be eligible to elect to have certain previously denied DIC claims reevaluated pursuant to changes that establish or modify a presumption of service connection. Any award as a result of the reevaluation may be made retroactive as if the establishment or modification of the presumption of service connection had been in effect on the date of the submission of the original claim. This amendment incorporates legislative changes enacted by the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 or the Honoring our PACT Act of 2022 and will bring federal regulations into conformance with those changes.

DATES: Comments must be received on or before [insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be

available at www.regulations.gov for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received: <http://www.regulations.gov>. VA will not post on Regulations.gov public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT: Eric Baltimore, Program Analyst, Pension and Fiduciary Service (21PF), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 632-8863. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Section 204 of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 or the Honoring our PACT Act of 2022, Pub. L. 117-168 (herein referred to as “the PACT Act”), enacted on August 10, 2022, amended, in relevant part, subchapter I of chapter 13 of title 38, United States Code, by adding a new section 1305 titled, “Reevaluation of dependency and indemnity compensation determinations pursuant to changes in presumptions of service connection.” VA proposes to issue a new regulation to be codified at 38 C.F.R 3.33 that incorporates this amendment.

Reevaluation of DIC Claim

DIC benefits are payable to eligible survivors of service members who died while on active duty, active duty for training, or inactive duty training; or eligible survivors of Veterans who (1) died as a result of a service-connected injury or disease or (2) were in receipt of, or entitled to receive, compensation at the time of death for a service-connected disability rated totally disabling(a) for at least 10 years immediately preceding death; or (b) for not less than five years since their release from active duty; or (c) for at least one year before death, if they were a former prisoner of war.

Service connection may be considered for certain conditions that VA presumes were caused by military service. If a Veteran's death is determined to be caused by a condition presumed to be incurred or aggravated by service, and the Veteran meets the unique circumstances and service requirements for that condition, DIC benefits may be awarded to an eligible survivor. Historically, VA has applied new presumptions of service connection based on statutory or regulatory changes prospectively, in accordance with 38 U.S.C. 5110(g). The amendments within the PACT Act will allow certain previously denied claims for DIC to be eligible for reevaluation based on any new (i.e. postdating the prior DIC claims' denial) law, regulation, or Federal court decision or settlement that establishes or modifies a presumption of service connection, and allow for retroactive application (where applicable), commencing with expanded presumptions afforded within the PACT Act itself.

The PACT Act also explains that any reevaluation of a previously denied DIC claim must be elected by the claimant. Proposed 38 CFR 3.33(c) states that the reevaluation of a previously denied DIC claim must be at the election of the relevant claimant and on a prescribed form pursuant to 38 CFR 3.152(a). Utilizing a prescribed form for the election of reevaluation by the claimant is consistent with 38 U.S.C. 5101(a)(1)(A) and 38 CFR 3.152(a), which provide that a specific claim on the form prescribed by the Secretary must be filed in order for VA to pay benefits. Additionally,

use of a prescribed form facilitates the orderly and timely reevaluation of a previously denied claim for DIC by documenting the claimant's unambiguous intent to seek a specific benefit (namely, DIC) on the basis of the newly established or modified presumption. The PACT Act does not stipulate any time limitations for an election by the relevant claimant; thus, there is no temporal limitation on when a claimant can elect to have a previously denied DIC claim reevaluated based on any new law, regulation, or Federal court decision or settlement that establishes or modifies a presumption of service connection.

Effective Date of Award

The changes within the PACT Act allow an award, otherwise known as a grant of benefits, based on a reevaluation to be made retroactively as if the establishment or modification of the presumption of service connection had been in effect on the date of the submission of the original claim. We propose to state in 38 CFR 3.33(d)(1) that if VA denied a claim for DIC prior to a law, regulation, or Federal court decision or settlement establishing or modifying a presumption of service connection effective on or after August 10, 2022 (the date of enactment of the PACT Act), and a relevant claimant is entitled to DIC benefits based on that establishment or modification, the effective date of the award will be based on the date of the submission of the original claim.

VA interprets section 204 of the PACT Act to allow this special retroactive effective date treatment in reevaluating DIC claims based on presumptions of service connection created directly by the PACT Act itself, such as amendments made by section 404, as well as presumptions of service connection added in the future pursuant to the process created by section 202. However, DIC claims outside the scope of section 204 are unaffected. We therefore propose to state in 38 CFR 3.33(d)(2) that if the requirements of paragraph (d)(1) are not met, the effective date of the award of DIC

shall be determined in accordance with 38 CFR 3.114 (pertaining to changes of law or VA issue) and 3.400 (pertaining to effective dates).

Identification of Relevant Claimants and Outreach

In order to properly implement the changes within the PACT Act, VA must identify and contact relevant claimants who submitted claims for DIC benefits that were previously denied and might have been evaluated differently had the newly established or modified presumption of service connection been in effect, and applicable to the claim, on the date it was originally submitted. Proposed 38 CFR 3.33(b) would define a relevant claimant for the purposes of reevaluation of a previously denied DIC claim as an individual who submitted a claim for DIC to VA that was evaluated and denied by VA before the date on which a law, regulation, or Federal court decision or settlement establishing or modifying a presumption of service connection went into effect and might have been evaluated differently had the establishment or modification of presumption of service connection been applicable to the claim.

Furthermore, the PACT Act explains that the Secretary must conduct outreach to notify relevant claimants that they may elect reevaluation of a previously denied DIC claim. Proposed 38 CFR 3.33(e) would outline the efforts that VA would undertake to inform a relevant claimant that they may elect reevaluation in light of the establishment or modification of a presumption of service connection. Within the proposed outreach efforts VA plans to inform relevant claimants that they may submit a claim by mail, in person at a VA regional office, or electronically through VA.gov. We propose the following outreach efforts to align with the outreach efforts defined within the PACT Act:

- (1) Publish on the internet website of the Department a notice that such claimants may elect to have a claim so reevaluated;
- (2) Notify, in writing, or by electronic means, Veterans service organizations of the ability of such claimants to elect to have a claim

reevaluated; and (3) Contact each relevant claimant in the same manner that the Department last provided notice of a decision. These efforts mirror the statutory requirements found under 38 U.S.C. 1305(b)(2).

The proposed outreach efforts would apply only to the original claimants of previously denied DIC claims because, as explained in the Accrued and Substitution Claims section below, only original claimants may initiate the reevaluation process.

Accrued and Substitution Claims

The PACT Act is silent on the accrued benefits or substitution process as it relates to the reevaluation of previously denied DIC claims. Thus, the existing processes regarding accrued benefits and substitution, contained in 38 U.S.C. 5121 and 5121A, would continue to apply. Under these rules, if VA grants substitution for a DIC reevaluation under 38 U.S.C. 1305(a) it will continue processing the reevaluation election as if it were made by the original claimant. To be clear, VA will only grant substitution for a DIC reevaluation in circumstances where the original claimant elected to have the previously denied claim reevaluated but subsequently died before the decision on the claim became final. An individual seeking accrued benefits or substitution cannot elect a reevaluation under the PACT Act of a previously denied DIC claim if the original claimant had not made such an election prior to their death. See 38 U.S.C. 5121A(a)(1); 38 CFR 3.1010(g)(1) (a claim must be “pending” in order for VA to grant substitution). However, an individual can pursue claims and appeals that were pending at the time of the original claimant’s death, to include an original claimant’s pending reevaluation election under the PACT Act, or claims where the period allowed by law for filing a notice of disagreement has not expired, as a substituted claimant if VA grants substitution.

Severability

The purpose of this section is to clarify the agencies' intent with respect to the severability of provisions of this proposed rule. Each provision that the agency has proposed is capable of operating independently. If any provision of this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule invalid. Likewise, if the application of any portion of this rule to a particular circumstance is determined to be invalid, the agencies intend that the rule remain applicable to all other circumstances.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Paperwork Reduction Act

This proposed rule includes provisions constituting a revised collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and approval.

OMB assigns control numbers to collection of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. If OMB does not approve the collection of information as requested, VA will immediately remove the provisions containing the collection of information or take such other action as is directed by OMB.

Comments on the new collection of information contained in this rulemaking should be submitted through www.regulations.gov. Comments should indicate that they are submitted in response to RIN 2900-AR76 *Reevaluation of Claims for Dependency and Indemnity Compensation* and should be sent within 60 days of publication of this rulemaking. The collection of information associated with this rulemaking can be viewed at: www.reginfo.gov/public/do/PRAMain.

OMB is required to make a decision concerning the collection of information contained in this rulemaking between 30 and 60 days after publication of this rulemaking in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the provisions of this rulemaking.

VA considers comments by the public on revised collection of information in

- Evaluating whether the revised collections of information are necessary for the proper performance of the functions of VA, including whether the information will have practical utility;
- Evaluating the accuracy of VA's estimate of the burden of the revised collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and

- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The revised collection of information associated with this rulemaking contained in 38 CFR 3.33 is described immediately following this paragraph, under its respective title.

Title: This control number includes 3 prescribed forms, however, only VA Form 21P-534EZ has a revised collection of information associated with this rulemaking.

1. VA Form 21P-534EZ, *Application for DIC, Survivors Pension, and/or Accrued Benefits*
2. VA Form 21P-534, *Application for Dependency and Indemnity Compensation, Survivors Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation if Available)*
3. VA Form 21P-534a, *Application for Dependency and Indemnity Compensation by a Surviving Spouse or Child – In-Service Death Only.*

OMB Control No: 2900-0004

CFR Provision: 38 CFR 3.33

- Summary of collection of information: The revised collection of information in proposed 38 CFR 3.33 would allow respondents to elect to have certain previously denied DIC claims reevaluated pursuant to changes that establish or modify a presumption of service connection. VA estimates this proposed change will increase the respondent burden by an additional 14,828 respondents in fiscal

year 2023 (FY23), subsequently increasing the estimated total annual reporting and recordkeeping burden.

- *Description of need for information and proposed use of information:* VA, through the Veterans Benefits Administration, administers an integrated program of benefits and services, established by law, for Veterans, service personnel, and their dependents and/or beneficiaries. Under the authority of 38 U.S.C. 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317 and 1318, VA will pay DIC benefits upon the death of a Veteran to certain eligible claimants. The information will be used by VA to determine if the claimant is eligible to elect to have certain previously denied DIC claims reevaluated pursuant to changes that establish or modify a presumption of service connection.
- *Description of likely respondents:* The respondent population for VA Form 21P-534EZ, VA Form 21P-534, and VA Form 21P-534a is primarily composed of survivors of deceased Veterans applying for VA survivors' benefits.
- *Estimated number of respondents:* Number of respondents is estimated at 181,588 per year for all 3 forms associated with OMB control number 2900-0004. These totals were derived from a query of our claims database and represent the actual number of each form received in an average year plus an additional estimated 14,828 respondents based on the change in section 204 of Public Law 117-168.
- *Estimated frequency of responses:* One time per application.
- *Estimated average burden per response:* The estimated completion time for each form is 43 minutes (0.716666 hours):
 - VA Form 21P-534EZ completion time is 40 minutes (0.67 hours)

- VA Form 21-534 completion time is 1 hour and 15 minutes (1.25 hours)
- VA Form 21-534a completion time is 15 minutes (.25 hours)
- *Estimated total annual reporting and recordkeeping burden:* VA estimates the total annual reporting and recordkeeping burden for all three forms to be 130,138 burden hours. VA estimates the annual reporting and recordkeeping burden based on the proposed rule to be 10,626 burden hours. This submission does not involve any recordkeeping costs.
- *Estimated cost to respondents per year:* VA estimates the annual cost to respondents to be \$3,645,165 (130,138 burden hours for respondents x \$28.01 per hour). VA estimates that the proposed rule would increase the number of respondents in FY23 by 14,828. The increase in cost to respondents per year based on the additional 14,828 respondents would result in an estimated information collection burden cost increase of \$297,634 (10,626 burden hours x \$28.01 per hour).

* To estimate the total information collection burden cost, VA used the Bureau of Labor Statistics (BLS) median hourly wage for hourly wage for “all occupations” of \$28.01 per hour. This information is available at https://www.bls.gov/oes/current/oes_nat.htm#13-0000.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). Therefore, pursuant to 5 U.S.C. 605(b),

the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Assistance Listing

The Assistance Listing numbers and titles for the programs affected by this document are: 64.101, Burial Expenses Allowance for Veterans; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Veterans.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on February 15, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulations Development Coordinator,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 3 as set forth below:

PART 3 – ADJUDICATION

Subpart A - Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A, continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. Add § 3.33 to read as follows:

§ 3.33 Reevaluation of Claims for Dependency and Indemnity Compensation Involving Presumptions of Service Connection Following Enactment of Public Law 117-168.

(a) *Purpose* This section states effective date and election rules based on amendments made under Public Law 117-168, which provides for the reevaluation of certain previously denied dependency and indemnity compensation (DIC) claims when a law establishes or modifies a presumption of service connection.

(b) *Definitions* For purpose of this section:

(1) *Law* means any law, regulation, or Federal court decision or settlement establishing or modifying a presumption of service connection.

(2) *Relevant claimant* means an individual who submitted a claim for DIC to VA that was evaluated and denied by VA before the date on which such a provision of law went into effect and might have been evaluated differently had the establishment or modification of the service connection presumption been applicable to the claim.

(c) *Election of review*

(1) *General.* VA will not reevaluate under this section any previously denied claim for DIC prior to election by the relevant claimant.

(2) *Form of election.* Reevaluation of a previously denied DIC claim must be at the election of the relevant claimant on a prescribed form pursuant to § 3.152(a).

(d) *Effective date of award.* If a relevant claimant is found entitled to DIC based on the establishment or modification of a presumption of service connection, the effective date of the award will be as follows:

(1) If VA denied a claim for DIC prior to a law defined under (b)(1) of this section that establishes or modifies a presumption of service connection on or after August 10, 2022, (the date of enactment of PL 117-168), the effective date of the award will be determined as if the establishment or modification of the presumption of service connection had been in effect on the date of the submission of the original claim.

(2) If the requirements of paragraph (d)(1) are not met, the effective date of the award shall be determined in accordance with §§ 3.114 and 3.400.

(e) *Outreach and identification of relevant claimants*

(1) VA will conduct the following efforts to inform a relevant claimant that they may elect to have a claim reevaluated in light of the establishment or modification of a presumption of service connection:

(i) Publish on the internet website of the Department a notice that such claimants may elect to have a claim so reevaluated;

(ii) Notify, in writing or by electronic means, veterans service organizations of the ability of such claimants to elect to have a claim so reevaluated; and

(iii) Notify each such claimant in the same manner that the Department last provided notice of a decision.

(Authority 38 U.S.C. 501, 1305)

